

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

SA.No. 192 of 1993(F)

O.S.635/81 OF FIRST ADDL.MUNSIFF COURT, NEYYATTINKARA
AS.231/1984 of DISTRICT COURT,TRIVANDRUM
.....

APPELLANTS/APPELLANTS/DEFENDANTS 16 & 23:

1. SANKARA PANICKER VASUDEVA PANICKER, KUMARAVILASOM
BUNGLOW, KEEZHAMMAKOM DESOM, CHENKAL VILLAGE.
(DIED)

2. LEKSHMI CHELLAMMA OF -DO- -DO-

1st APPELLANT DIED. 2nd APPELLANT IS RECORDED AND ADDL.APPELLANTS
IMPLEADED AS LEGAL REPRESENTATIVES OF DECEASED 1ST APPELLANT AS
PER ORDER DT.5/12/2001 ON CMP 2236/2001

2nd Appellant LAKSHMI CHELLAMMA, KUMARAVILASOM
BUNGLOW, KEEZHAMMAKOM DESOM, CHENKAL VILLAGE.
--- RECORDED

ADDL.A3 V.KUMARESAN, DO. DO.

ADDL.A4 V.RAMESAN, DO. DO.

ADDL.A5 V.AJITHKUMAR DO. DO.

ADDL.A6 C.VALSALA, DO. DO.

ADDL.A7 C.LEELA, DO. DO.

ADDL.A8 C.VASANTHAKUMARI, DO. DO.

ADDL.A9 C.SHOBHANAKUMARI, DO. DO.

ADDL.A10 C.LATHAKUMARI, DO. DO.

BY ADV. SRI.G.UNNIKRISHNON
SRI.G.P.SHINOD
SRI.RAM MOHAN.G.

RESPONDENTS/RESPONDENTS 2 TO 23/DEFENDANTS 1 TO 15, 17
TO 22 AND LEGAL REPRESENTATIVE OF PLAINTIFF (RESPONDENTS
9 AND 10 ARE NOW MAJORS)

1. ANANTHU MANDAKINI, KOOTHAKKOTTU VEEDU,
KEEZHAMMAKAM DESOM, CHENKAL VILLAGE.
2. MANDAKINI SYAMALA OF DO. DO.
3. NARAYANAN SIVARAJAN OF DO. DO.
4. NARAYANAN KRISHNANKUTTY OF DO. DO.
5. NARAYANAN SASI OF DO. DO.
6. NARAYANAN SUDHAKARAN OF DO. DO.
7. MANDAKINI SREEKUMARI OF DO. DO.
8. NARAYANAN SREEKUMARAN OF DO. DO.
9. MANDAKINI USHA OF DO. DO.
10. MANDAKINI SHEELA OF DO. DO.
11. VELAYUDHAN SADANANDAN, VARUVILAKATHU PUTHEN VEEDU,
KALLIYOOR DESOM, NEMOM VILLAGE.
12. MATHEVAN SADASIVAN, ANI BHAVAN, KEEZHAMMAKOM DESOM,
CHENKAL VILLAGE (DIED ON 16/10/1995 LRS IMPEADED AS
ADDL.R23 TO R26)
13. RAGHAVAN KRISHNAN, KUZHINJAKALA KRISHNAMANDIRAM,
DO. DESOM.
14. RAGHAVAN SREEDHARAN, SAROJAMANDIRAM, DO. DESOM
15. KALLIYANI THULASI BAI OF DO. DO.
16. BHANU GOPINATHAN, KOLLAMVILAKATHU VEEDU,
DO. DESOM
17. PARVATHY KAMALAKSHY, KUZHIVILA PUTHEN VEEDU, DO.
DESOM
18. KUNJUKRISHNAN NADAR HARRIS NADAR, PANAVALAKATHU
MURUGAVILASOM BUNGLOW, VENKADAMPU DESOM,
KULATHOOR VILLAGE
19. LEKSHMY ANANDAM, THICKACHIVILA BUNGLOW,
MACHIKODE DESOM, CHENKAL VILLAGE

20. LEKSHMY CHELLAMMA, APPILIVILAKATHY VEEDU
DO. DESOM
21. LEKSHMY THULASI BAI, CHOORAKKATTU VARUBUNGLOW
HAVING ALSO APPILIVILAKATHU VEEDU, DO. DESOM
22. JAGADAMMA, RAVEENDRAVILASOM BUNGLOW,
KURUMPETTIKONAM POOZHILKUNNU UCHAKKADA.P.O.,
VENKADAMPU DESOM, KULATHOOR VILLAGE,
NEYYATTINKARA.

R12 DIED LRS IMPEADED AS ADDL.23 TO 26 AS PER ORDER
DT..27/8/1998 ON CMP 741/98

ADDL.23 SMT.SURYA BHAI REMA BHAI ALIAS BABY
ANIBHAVAN, POOZHILKUNNU ,KUZHINJAKALA,
KEEZHAMAKKOM, CHENKAL.P.O.

ADDL.24 VIMALA OF DO. DO.

ADDL.25 GIRIJA OF DO. DO.

ADDL.26 ANILKUMAR OF DO. DO.

BY ADV. SRI.P.LAWRENCE(R1 TO 10, 12 TO 15)
R11 BY SRI.V.S.BABU GIREESAN,B.G.BIDAN CHANDRAN
R18 BY SRI.N.NANDAKUMARA MENON
R22 BY SRI.B.KRISHNAMONI
R23 BY SRI.R.S.KALKURA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 20/03/2007, THE COURT ON DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

CROSS OBJECTION 12 OF 2003

IN

SA.No. 192 of 1993(F)

O.S.635/81 OF FIRST ADDL.MUNSIFF COURT, NEYYATTINKARA
AS.231/1984 of DISTRICT COURT,TRIVANDRUM

.....

CROSS APPELLANTS/RESPONDENTS 13-15 & 23

1. RAGHAVAN KRISHNAN KUZHINJAKALA KRISHNAMANDIRAM,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
2. RAGHAVAN SREEDHARAN, SAROJAMANDIRAM,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
3. KALLIYANI THULASI BAI, SAROJAMANDIRAM,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
4. LEKSHMY THULASI BAI, CHOORAKATTU VARUBUNGLOW,
HAVING ALSO APPIVILAKATHU VEEDU, MACHIKODE DESOM,
CHENKAL VILLAGE

BY ADV.R.S.KALKURA

RESPONDENTS/APPELLANTS, RESPONDENTS:

1. SANKARA PANICKER VASUDEVA PANICKER,
KUMARAVILASOM BUNGLOW, KEEZHAMMAKOM DESOM,
CHENKAL VILLAGE.
2. LEKSHMI CHELLAMMA, KUMARAVILASOM BUNGLOW,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE.
3. ANANTHU MANDAKINI, KOOTHAKKOTTU VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
4. MANDAKINI SYAMALA,KOOTHAKKOTTU VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
5. NARAYANAN SIVARAJAN,KOOTHAKKOTTU VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE

6. NARAYANAN KRISHNANKUTTY, KOOTHAKKOTTU VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
7. NARAYANAN SASI, KOOTHAKKOTTU VEEDU,
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8. NARAYANAN SUDHAKARAN, KOOTHAKKOTTU VEEDU,
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9. MANDAKINI SREEKUMARI, KOOTHAKKOTTU VEEDU,
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14. BHANU GOPINATHAN, KOLLAMVILAKATHU VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
15. PARVATHY KAMALAKSHY, KUZHIVILA PUTHEN VEEDU,
KEEZHAMMAKOM DESOM, CHENKAL VILLAGE
16. KUNJUKRISHNAN NADAR HARRI NADAR, PANAVALAKATHU
MURUGAVILASOM BUNGLOW, VENKADAMPU DESOM,
KULATHOOR VILLAGE
17. LEKSHMY ANANDAM, THICKACHIVILA BUNGLOW, MACHIKODE
DESOM, CHENKAL VILLAGE
18. LEKSHMY CHELLAMMA, APPIVILAKATHU VEEDU,
MACHIKODE DESOM, CHENKAL VILLAGE
19. JAGADAMMA, RAVENDRAVILASOM BUNGLOW, KURUMPETTICONAM
POOZHICKUNNU, UCHAKKADA.P.O., VENKADAMPU DESOM,
KULATHOOR VILLAGE, NEYYATTINKARA.

JUDGMENT

DISMISSED AS NOT PRESSED.

SD/-M.SASIDHARAN NAMBIAR,
JUDGE.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.192 OF 1993

Dated 20th March 2007

J U D G M E N T

Defendants 16 and 23 in O.S.635/1981 on the file of First Additional Munsiff court, Neyyattinkara are appellants. First respondent was the plaintiff and respondents 2 to 15 and 17 to 22 are other defendants. First respondent filed the suit seeking a decree for partition. Case of first respondent was that plaintiff schedule property originally belonged to the tharwad of Mathevan Raman who executed Ext.B17 mortgage in respect of his 1/6th share in favour of Kali Pillai Narayana Pillai and on the death of mortgagee his rights devolved to his daughter Chembakakutti Pillai who in turn assigned her 1/4th of 1/6th mortgage right, under Ext.A1 in favour of plaintiffs and her brother Padmanabhan Narayanan. Defendants 1 to 10 are legal heirs of Padmanabhan Narayanan. Chembakakutti Pillai executed Ext.B22 Arthapattuseettu (release deed) in favour of Rudrayani and others whereunder remaining 3/4th of 1/6th right under Ext.B17 was transferred in

favour of Rudrayani and others. Rudrayani and others under Ext.B8, assigned portions of the property in favour of 2nd appellant (23rd defendant). Rudrayani and others had earlier created Ext.B21 mortgage on 6/4/1116 M.E in favour of Poulu Yovan and the mortgagee Yovan assigned his rights under Ext.B21 in favour of 16th defendant under Ext.A20 on 8/11/1119 M.E. Rights assigned under Ext.B8 in favour of second appellant was inclusive of the right of equity redemption over Ext.B21 mortgage. First respondent contended that Chembakakutti Pillai executed a Chitotti in favour of Parameswara Panicker who released it in favour of Bhanu Panicker and later Chembakakutti Pillai had created superior mortgage in favour of Bhanu Panicker and it was on that strength the right of Parameswara Panicker was got released. First respondent further contended that defendants 12 to 15 got the rights of Bhanu Panicker under Ext.B4. It was also contended that in the partition effected in the family of Mathevan Raman 1/12th share was allotted to 16th defendant and his mother and brothers and Mathevan Raman and Mathevan Gopalan assigned their rights in favour of 16th defendant in 1950 and 16th defendant also obtained 29 5/7 cents being his

share in the family properties and 16th defendant in turn filed O.S.708/1950 for redemption of the mortgage in respect of the share of the property allotted to him and though a decree was passed, it was not executed. It was also contended that 16th defendant filed O.S.579/1954 before Munsiff court, Neyyattinkara and though decree was granted that was also not executed and Mathevan Sivaraman as plaintiff and 16th defendant and others as defendants O.S.3/55 a suit for partition was filed before Munsiff court, Neyyattinkara and 16th defendant herein was 7th defendant and Madan Mathevan who got assignment of right of Chakki Kunchena assigned 4 cents of the property in favour of 16th defendant and as per the final decree plot No.7 having an extent of 1 acre and 1.80 cents and 100 sq.links was allotted to 16th defendant and defendants 17 to 22 are entitled to the remaining shares deducting 1/6th share of 16th defendant and defendants 20 to 22 instituted O.S.1265/68 for redemption of the mortgage in respect of the property allotted to them and that suit was dismissed on 8/7/1970 holding that the mortgage cannot be redeemed. It was further contended that after the final decree in O.S.3/1955 plaintiff is in

possession of $1/8^{\text{th}}$ share jointly with defendants and therefore he is entitled to get his share separated. Defendants 12 to 15 contended that they obtained 75 cents and contended that they are entitled to get their share separated. 17^{th} defendant contended that 16.332 cents in plot No.13 belongs to 18^{th} defendant claimed that plot No.23 in the plan appended to final decree in O.S.3/55 belongs to him on the basis of assignment in favour of Krishna Panicker and Ramachandran and others. 19^{th} defendant claimed that plot No.4 was in his possession as per sale deed dated 27/4/1979.

2. Appellants, husband and wife contended that Mathevan Raman was entitled to $1/6^{\text{th}}$ share and he mortgaged his right under Ext.B17 and Chembakakutti Pillai executed Ext.B22 release deed in respect of $3/4$ of $1/6^{\text{th}}$ share and in the partition effected between Raman and his brother they together got half of $1/6^{\text{th}}$ share and other half was allotted to Valli Lakshmi and her children including 16^{th} defendant and in a partition amongst Valli Lakshmi and children in 1950, 16^{th} defendant was allotted 29 $5/7$ cents being his share and subsequently he purchased 4 cents being a portion from Madan Mathevan and

constructed a building therein. Mathevan Raman and Mathevan Gopalan assigned their half share in favour of 16th defendant and thus apart from that half share, 16th defendant has 29 5/7 cents as well as 4 cents and 16th defendant obtained decrees for redemption of the mortgage in respect of property allotted to him but he did not execute decree. As per decree in O.S.3/55, 1.80.100 acre was allotted to him as his share being plot No.7 and they have title and exclusive right and possession over that property and plaintiff and others are not entitled to claim shares in the property.

3. Learned Munsiff framed necessary issues. On the evidence of PW1, DW1 and Exts.A1 to A5 and Ext.B1 to B26 learned Munsiff granted a preliminary decree directing partition and allotment of 1/8 share to plaintiff and 1/8 share together to defendants 1 to 10, 59 cents to 11th defendant and 16.332 cents to 17th defendant, 75 cents to defendants 12 to 15 and 15 cents to 18th defendant and 15th cents to 19th defendant. Appellants challenged the decree and judgment before District court, Thiruvananthapuram in A.S.231/1984. Learned District Judge after re-appreciation of evidence

modified the preliminary decree. Learned District Judge confirmed allotment made to plaintiffs and defendants 1 to 10, 12 to 15 and 17 to 19. But the share allotted to defendants 17 and 19 was modified as confined to plot No.4, 23 and 30. It was held that 16th defendant is entitled to get 4 cents and 19 cents in plot No.7 and 23rd defendant will get only the remaining portion of plot No.7 after allotment of the other shares and 11th defendant will be entitled to the balance extent if any left and allotment to defendants 11 and 23 will be determined in the final decree proceedings as well as equities to the parties. Modified preliminary decree and judgment in A.S.231/84 is challenged in this second appeal.

4. Second appeal was admitted formulating following substantial questions of law.

1) Whether preliminary decree passed by courts below is bad in law for the reason that Ext.B17 mortgage is admittedly over 1/6th share of 15.74 acres and not a specified plot described in the plaint schedule and directed to be partitioned.

2) Whether finding of courts

below that Ext.B24 delivery list is not binding on the parties as they are not parties in Ext.B23 suit is correct.

3) Whether findings of courts below that 23rd defendant is not entitled to get 1 acre 76 cents covered under Ext.B8 assignment deed is sustainable.

5. Learned counsel appearing for appellants and respondents were heard.

6. On going through judgments of trial court and first appellate court, it is clear that a preliminary decree was passed based on the presumption that plaint schedule property was 1/6 share due to Mathevan Raman and allotted in the final decree in O.S.3/1955. Preliminary decree or its judgment or judgment in the final decree were not produced by any of the parties. In view of the doubt expressed, copy of preliminary decree was called for from Munsiff, Neyyattinkara and was perused to find out the factual position. From the judgment in the preliminary decree in O.S.3/1955, it is seen that that suit was filed by Mathevan Sivaraman claiming his share in the plaint schedule properties therein. Judgment shows that total property having an extent of 18 acres

and 14 cents originally vested in five persons namely, Parvathy Chakki, Kumaran Mathevan, Chakki Piratti, Mathevan Kumaran or Kumaran Kumaran and Perumal Parvathi. Of these persons Parvathi Chakki had 1/3 right and the remaining four persons had 1/6 shares each. It is also seen from the judgment that 2/6 shares of Parvathi Chakki was sold in court auction in O.S.184/1066 and was purchased by Mathevan Raman. It is also seen that a contention was raised that Mathevan Raman obtained only half of 2/6 shares due to Parvathi Chakki and remaining 1/6 share was purchased by Chakki Kuchena as per another court auction sale. But no specific finding was seen arrived at in that judgment. Rights claimed by the parties in the present suit is the 1/6 share of Mathevan Raman obtained in court auction sale. It is admitted case that Mathevan Raman who had 1/6 right over the properties covered in O.S.3/1955 created Ext.B17 mortgage in favour of Kali Pillai Narayana Pillai. Property covered under Ext.B17 is 16.22 acres. But before the court below it was contended that total extent was only 15.74 acre. It was admitted that total extent is 15 acres and 74 cents as against more extent shown in Ext.B17. On

the death of mortgagee Narayana Pillai his rights devolved on daughter Chembakakutti Pillai. It is admitted that Chembakakutti Pillai in turn assigned her 1/4 of 1/6 mortgage right in favour of plaintiff and Padmanabha Narayanan which is sought to be partitioned by filing the present suit. It is also not disputed that Chembakakutti Pillai created Ext.B22 assignment deed in respect of remaining 3/4 of Ext.B17 mortgage right in favour of Rudrayani and others. Appellants are claiming that Rudrayani and others under Ext.B8 transferred their right in respect of portions of Ext.B22 right in favour of 23rd defendant and that property includes 18 cents of property which was mortgaged by Rudrayani and others in favour of Yovan which in turn was assigned by Yovan in favour of 16th defendant under Ext.B20. The extent covered under Ext.B8 is 1.76 acres. In O.S.3/1955 16th defendant was 7th defendant. 7th defendant therein had claimed apart from the rights derived from Chembakakutti Pillai had jenmom right from other members of original family and 29 5/7 cents was allotted to 16th defendant as per the partition in their family. Under Ext.B18, 16th defendant had purchased 4 cents of the property from

other branch of the family. Case of appellants was that 3/4 of 1/6 of Ext.B17 mortgage right which vested with Rudrayani and other now vests with them and it is apart from the other right, 16th defendant had right over the properties as member of the family and an assignee under Ext.B18.

7. Courts below directed partition of plaint schedule properties on the basis that plot allotted to 16th defendant under Ext.A3 final decree in O.S.3/1955 was 1/6th share due to Mathevan Raman. It was disputed by the appellants. Unfortunately, this aspect was not considered by the trial or first appellate court. In fact, there is no specific pleading in the plaint that plaint schedule property is the 1/6 share due to Mathevan Raman and separately allotted to him under Ext.A3 final decree and therefore that property is to be divided between the parties. Question as to which exactly is the property belonging to Mathevan Raman which was in mortgage under Ext.B17 is the crucial aspect to be decided before deciding the question of shares of the parties. Unless it is established that plaint schedule property is the property mortgaged under Ext.B17, plaintiff being the

assignee of 1/4 right of 1/6 right of the mortgagee, is not entitled to claim a share. So also, other defendants 1 to 10 being the legal heirs of co-assignee Padmanabhan Narayanan under Ext.A1 sale deed are not entitled to get plaintiff schedule property divided without establishing the fact. This aspect is therefore to be decided before determining the question of allotment of shares due to the parties. Learned Munsiff did not consider these aspects in the proper perspective. Learned District Judge proceeded on the basis that plot No.7 is 1/6th share due to Mathevan Raman and 23rd defendant is entitled to get only the remaining property after allotting shares to other defendants without deciding the question whether 23rd defendant being the assignee of 3/4 share of Ext.B17 mortgagee is not entitled to get equal treatment like the plaintiffs and defendants 1 to 10 under Ext.A1 assignment deed. As these aspects were not considered by the courts below, it is necessary to remand the suit for fresh disposal in accordance with law.

8. Appeal is therefore allowed. Decree and judgment passed by learned Munsiff and modified by

learned District Judge are set aside. O.S.635/1981 is remanded back to First Additional Munsiff court, Neyyattinkara for fresh disposal in accordance with law. Learned Munsiff has to decide whether plot No.7 allotted under Ext.A3 final decree is the 1/6th share due to Mathevan Raman. Only if it is found to be the 1/6th share due to Mathevan Raman, which in turn was mortgaged under Ext.B17 the properties could be divided in between the parties. Parties are entitled to adduce further evidence in support of their respective cases. Parties are directed to appear before learned Munsiff on 25/5/2007.

**M.SASIDHARAN NAMBIAR,
JUDGE.**

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.192 OF 1993

20th March 2007

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